LIBRARY
SUPREME COURT, U. S.

75-233

Supreme Court, U. S.
FILED
SEP 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975.

No. 75.

ROBERT J. DeCHIARO and ROBERT G. LUTZ,
Petitioners,

v.

THE STATE OF NEW YORK,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

DONALD J. SHANLEY,
Special Prosecutor,
Rensselaer County, New York,
35 First Street,
Troy, N. Y. 12180

Table of Contents.

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Argument	18
Conclusion	27

TABLE OF CASES.

Arellanes v. United States, 302 F. 2d 603 (9th Cir. 1962)	23
Arellanes v. United States, 326 F. 2d 560 (9th Cir. 1964)	23
Avery v. State of Alabama, 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377	25
Brown v. United States, 264 F. 2d 363 (D. C. Cir. 1959), cert. den. 360 U. S. 911, 79 S. Ct. 1299	25
Cleveland v. United States, 322 F. 2d 401, 402-403, cert. den. 375 U. S. 884, 84 S. Ct. 841, 11 L. Ed. 2d 114 (1963)	25
Glenn v. United States, 303 F. 2d 536, 540-541 (5th Cir. 1962)	23

Page

Johnson v. United States, 291 F. 2d 150 (8th Cir. 1961) 25

Johnson v. United States, 318 F. 2d 855 (8th Cir. 1963) 25

Leino v. United States, 338 F. 2d 154 (10th Cir. 1964) 23

Neufield v. United States, 118 F. 2d 375 (D. C. Cir. 1941), cert. den. Rubin v. United States, 315 U. S. 798, 62 S. Ct. 580, 86 L. Ed. 1199 24

Patton v. State of North Carolina, 315 F. 2d 643 (4th Cir. 1963) 25

People v. Davis, 21 A. D. 2d 375 (N. Y.), lv. to app. den. 27

People v. Higgins, 23 A. D. 2d 504 (N. Y.), aff'd 16 N. Y. 2d 751 27

People v. O'Neill, 179 P. 2d 10, 78 Cal. App. 2d 888, cert. den. O'Neil v. State of California, 333 U. S. 858, 68 S. Ct. 728, 333 U. S. 858, 92 L. Ed. 27

People v. Reynolds, 39 A. D. 2d 812 (N. Y.) 27

Sanchez v. United States, 311 F. 2d 327 (9th Cir. 1962), cert. den. 373 U. S. 949, 83 S. Ct. 1678 27

Smith v. United States, 353 F. 2d 838 (D. C. Cir. 1965) 24

Swope v. McDonald, 173 F. 2d 852 (9th Cir. 1949), cert. den. 337 U. S. 960, 69 S. Ct. 1522, 93 L. Ed. 1759 24

Page

United States v. Abbamonte, 348 F. 2d 700 (2nd Cir. 1965) 24

United States v. Arden, 252 F. 2d 491 (2nd Cir. 1958) 23

United States v. Bando, 244 F. 2d 833, 845-846 (2nd Cir. 1957), cert. den. 355 U. S. 844, 78 S. Ct. 67, 2 L. Ed. 2d 53 26

United States v. Bentvena, 319 F. 2d 916, 936 (2d Cir. 1963), cert. den. *sub nom.* Ormento v. United States 375 U. S. 940, 84 S. Ct. 345, 11 L. Ed. 2d 271 23

United States v. Cozzi, 354 F. 2d 637 (7th Cir. 1966) 23

United States v. Fay, 348 F. 2d 705 (2nd Cir. 1965) 24

United States v. McMann, 252 F. Supp. 539 (N. D. N. Y.) 25, 26

Ungar v. Sarafite, 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed 2d 921 (1964) 25

United States v. Sperling 506 F. 2d 1323 (D.C. Cir. 1974) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75

ROBERT J. DECHIARO and ROBERT G. LUTZ,

Petitioners,

v.

THE STATE OF NEW YORK,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

The respondent, The People of The State of New York, by Donald J. Shanley, Special Prosecutor for Rensselaer County, makes and serves the following as and for its brief in opposition to the petition for a writ of certiorari made by the petitioners above-named for the purpose of reviewing their convictions for the crimes of burglary in the first degree and attempted robbery in the first degree.

Opinion Below.

The opinion of the Appellate Division of the Supreme Court, Third Judicial Department, was rendered on May 8, 1975, and is set forth in full at pages 32-36 of the appendix to the petition. The opinion is not yet officially reported, to the knowledge of respondent. The petitioners were denied permission to appeal to the Court of Appeals by an order dated May 16, 1975. No opinion was rendered in connection with such denial.

Jurisdiction.

Respondent does not question the jurisdiction as set forth in the petition.

Questions Presented.

Respondent feels that petitioners have not adequately set forth the true and complete nature of the legal issues presented to the Court upon this application and would restate the questions presented to the Court as follows:

1. May petitioners be heard to complain that their Sixth Amendment constitutional right to the assistance of counsel has been infringed upon when:

(a) They knowingly and voluntarily discharged their competent and fully prepared attorneys after the commencement of their trial without any sufficient reason or justification therefor; and

(b) They thereafter attempted to hire another attorney who, when offered a continuance for the purpose of preparing himself, deemed such continuance inadequate for his purposes and refused to enter the case; and

(c) They thereafter refused to accept as court-appointed counsel the same competent and fully prepared attorneys they had groundlessly discharged; and

(d) They would not even accept the assistance of such attorneys during the trial, stating that, if they could not have the attorney referred to in paragraph (b) above, they would not have any attorney; and

(e) They thereafter refused to participate in the trial but sat mute during the entire course thereof.

2. May the opinion of the trial judge as to the admissibility of evidence given during the course of an off-the-record conference had in chambers between the judge and the attorneys be raised to the level of a reviewable trial ruling merely because the opinion was later alluded to in the Courtroom?

3. May petitioners be deemed to have preserved any issues for appellate review when they refused to participate in the trial, but instead sat mute?

Constitutional Provisions Involved.

The constitutional provisions involved are as stated in the petition.

Statement of the Case.

Respondent does not accept the statement of the case as presented by petitioners as being complete and accurate. Moreover, at pages 11, 13, and 14 of the petition, petitioners have repeatedly referred to various conversations which are not in the record and, therefore cannot and should not be included in the statement of the case and, further, should not be considered by this Court. Accordingly, respondent has prepared and set forth below its own statement of the case which, it submits, more fully and clearly reflects what transpired below. All page references are to the record of appeal in the Court below.

On January 28, 1973, at approximately 10:30 P.M., four men approached the Crooked Lake Hotel located on Crooked Lake in the Town of Sand Lake, Rensselaer County, New York (trial transcript, pp. 339, 426). The

New York State Police had previously been warned that there would be a robbery attempted during that weekend and police officers were secreted throughout the building on the evenings of January 26, 27 and 28, 1973, hoping to apprehend the perpetrators (400-410).

While two men waited outside, the other men (later identified as the petitioners Lutz and DeChiaro) removed a pane of glass from a storm window and entered the basement area of the hotel (435). Previous to the actual break-in, three State Police Investigators, Judkins, Lukacovic and Daucher who were hidden in a room adjacent to the area where the break occurred saw both petitioners come to the windows and look inside and make further investigations of the area before entering (426-433, 452-453, 470-474). These same Investigators additionally testified that on the previous evening, January 27, 1973, they had been "staked out" in the same location and the same two men (petitioners) had come to the same windows and "cased" the area and the building (96-99). Investigator Judkins testified that prior to their entering the building on January 28, 1973, the petitioner DeChiaro had a pistol in his right hand (431, 432).

Once inside the building in an area used during the summer as a snack bar, petitioners entered the main area of the basement through a door. Investigators Daucher and Lukacovic, each armed with shotguns and equipped with flashlights, were behind this door in a hallway (454-457, 472-474). As petitioner entered, Investigators Daucher and Lukacovic retracted and then turned on their flashlights. Both clearly identified petitioners as the men who appeared in the beams of their flashlight (456, 475, 476). Investigator Lukacovic stated that he was personally acquainted with both petitioners, having previously seen them on the street on many occasions (468, 469).

Petitioners were taken by surprise when the flashlights were ignited. Both Investigators, Daucher and Lukacovic, stated that petitioner DeChiaro swung toward them with the pistol in his hand and, at that juncture, both Investigators fired their shotguns (459, 478).

Neither petitioner was struck by the shots and both fled the building (478). As they emerged Investigator Robert Stapleton came out onto an upper porch, observed that the subjects were armed and fired another shotgun blast at them, but again petitioners remained unscathed (523) and succeeded in fleeing into the woods nearby (383-386).

The State Police immediately organized a search party and petitioners' tracks were followed through the snow for some miles (481-569). Finally, early next morning the petitioners were found hiding in a tree in heavy woods some few miles from the scene of the crime (530-532).

Petitioners were indicted for burglary in the first degree and attempted robbery in the first degree. The allegation of each count was that, during the commission of each crime charged, one or more of said petitioners displayed what appeared to be a pistol, revolver or other firearm.

Within a short time of their arrest the petitioners retained counsel to represent them on these charges. Petitioner DeChiaro retained attorney Thomas J. O'Connor, Jr., of Troy, New York, and petitioner Lutz retained attorney E. Stewart Jones, Jr., also of Troy, New York. Both attorneys immediately procured an order directing the District Attorney to show cause why a preliminary hearing should not be held and on February 13, 1973, argument was had upon such application (1-14). Following such argument, the late Hon. Matthew M. Dunne, Acting Rensselaer County Judge, granted petitioners' ap-

plication and directed that a preliminary hearing be held before the Justices' Court of the Town of Nassau (15, 16). This preliminary hearing was held and both Mr. Jones and Mr. O'Connor appeared and participated in such hearing. Both petitioners were held for action by the grand jury.

Following their indictment, petitioners were arraigned in the Rensselaer County Court on May 29, 1973 (25-28). Attorneys Jones and O'Connor continued their representation of petitioners.

Thereafter, these attorneys made the following motions on behalf of the petitioners:

1. Each attorney moved to suppress written confessions allegedly made by each petitioner concerning their participation in this crime upon the grounds that each confession had been coerced. As a result of these motions, the People agreed that neither confession would be used upon the trial and so no formal order of suppression was made (30-34).

2. Each attorney moved to dismiss the indictment upon the grounds of selective enforcement of the provisions of the Penal Law by the People—the argument being that petitioners had been indicted for the burglary and attempted robbery but the State Police had not been indicted for assaulting petitioners. This novel and imaginative motion was denied (39-42).

3. Each attorney moved to dismiss the indictment in the interests of justice, again because of an alleged deprivation of their constitutional rights following their arrest and this also was denied (42-43).

4. Each attorney moved to suppress prospective trial identification of the petitioner as perpetrators of these crimes upon the grounds that prior to their "stakeout" the State Police officers had examined "mug shots" of the petitioners and that this was so suggestive as to taint their later view of the petitioners at the scene of the crime (43-45). A hearing was directed on this issue.

5. Each attorney moved on behalf of petitioners for an order permitting a discovery and inspection of many items of physical evidence, reports, analysis and even all "exculpatory evidence." This motion was largely granted but denied in part.

6. Each attorney also sought and obtained bills of particulars of the indictments.

The argument of these motions was had on June 18, 1974, a year and one month or so after the arraignment of petitioners. The delay was occasioned by the following set of unusual circumstances: the Rensselaer County Judge Timothy J. Fogarty died; the District Attorney was appointed County Judge; the Public Defender of Rensselaer County, whose office had represented one of the other men allegedly involved in this crime, was appointed to be District Attorney and, finally, Acting Rensselaer County Judge (and Surrogate) Matthew M. Dunne also died. The result of this unusual sequence of events was that (a.) a Special County Judge had to be assigned from outside the County and (b.) a Special Prosecutor had to be found, selected and appointed.

During all of this one year lapse of time, both petitioners continued to be represented by attorneys Jones and O'Connor. No "speedy trial" motion was ever made and, except as a matter of interest, the lapse of one year is without further legal significance.

During the summer of 1974 petitioners' discovery motion was decided, formalized and implemented. The Special Prosecutor in the middle of August, 1974, took petitioners' attorneys to the State Police Troop G Headquarters in Loudonville, New York, and permitted a visual inspection of all items of physical evidence. Defense attorney O'Connor, acting for himself and attorney Jones was permitted to see every photograph and order copies of those which he wanted. Copies of all scientific and ballistic reports and analyses were provided. Defense counsel announced their satisfaction with the discovery and inspection. One test remained to be performed. Police had recovered ski masks near the scene of the crime which contained hairs. By court order the People were permitted to obtain samples of petitioners' hairs for comparison analysis, subject, however, to the right of petitioners' expert to be present when the analysis was made.

In the middle of August, 1974 (or thereabout), both defense counsel and the Special Prosecutor were advised by Hon. John J. Clyne, Albany County Judge, that he had been assigned to preside at the trial of these petitioners at the September 1974 trial term of the Rensselaer County Court and that this case was to be the first one reached. All attorneys were acquainted with the fact that Judge Clyne's assignment was to end on or about September 19, 1974, and all attorneys were sternly admonished to be ready to proceed to trial at the time indicated. This admonition was discussed by all counsel on several occasions during that August and certainly there was no misunderstanding as to what was to occur and when. The Special Prosecutor began feverish trial preparations and was aware that his adversaries were not idle on their side.

On September 6, 1974, both defense counsel and the Special Prosecutor participated in earnest and protracted plea bargaining, which proved not fruitful. In the interim, legal proceedings had gone forward as a result of conferences between counsel and Judge Clyne. Certain decisions were reached. Firstly, the People had agreed that they would not under any circumstances, even for impeachment, make use of either written confession made by the petitioners. This wholly obviated any need for a suppression hearing in that respect. Secondly, the court had agreed, over the People's strenuous objections, that petitioners were entitled to a hearing upon the issue of identification testimony. The hearing was to commence on the following Monday, September 9, 1974, to be followed immediately by the actual trial.

On the issue of the hair comparison analysis, it was discovered, when reasons for the delay were investigated, that petitioners' expert had failed to notify the State Police Laboratory when he would be available for the tests and this had prevented the occurrence of the test. Final arrangements for the tests were made. Attorneys for petitioners did not protest their unreadiness.

On Friday evening, September 6, 1974, attorney Jones telephoned the Special Prosecutor and advised him that he would seek, on September 7, 1974, an order from Mr. Justice Michael E. Sweeney of the Appellate Division of the Supreme Court directing the Special Prosecutor to show cause why a change of venue should not be had because of alleged prejudicial pretrial newspaper publicity. On September 7, 1974, attorney Jones and the Special Prosecutor journeyed to the home of Justice Sweeney in Saratoga Springs, New York, for argument of the order to show cause. Justice Sweeney signed the order and the matter was scheduled for argument before this court on September 9, 1974.

In the interim, Judge Clyne directed that the identification hearing go forward as scheduled on September 9, 1974. On this date, the hearing commenced (53). Attorneys Jones and O'Connor appeared for petitioners and participated in the hearing throughout that day (53-193). Defense counsel cross examined the People's witnesses, made necessary objections and fully protected the rights of their clients.

During luncheon recess on September 9, 1974, attorneys Jones and O'Connor and the Special Prosecutor appeared before the Appellate Division of the Supreme Court at Albany, New York, and made oral arguments on petitioners' application for a change of venue. By 4:30 that afternoon, that court had made its decision denying petitioners' motion in its entirety.

The next morning, September 10, 1974, the Rensselaer County Court reconvened for the purpose of continuing the identification hearing (194). It was understood that on the day following, September 11, 1974, jury selection would commence in the trial-in-chief. On September 10, as the Special Prosecutor was about to swear his first witness of the day, Mr. Jones suddenly arose and loosed a bombshell. He announced that he had been advised by petitioner Lutz about "five minutes ago" that he had been discharged as his attorney (195). Mr. Jones further announced that he had been advised by Mr. Lutz that on the previous evening both petitioners had retained "the firm of F. Lee Bailey to defend them on these charges" (195). Mr. Jones further advised the court that Mr. Bailey would be in court "tomorrow morning for the purpose of defending Mr. Lutz and Mr. DeChiaro" (196). The court pointed out that a jury was to be selected the following day (196). Mr. Jones asked for a continuance. The court denied the motion "in the exercise of discretion" and directed that the hearing continue (196). Mr. Jones protested that he had been discharged.

At this point, the trial justice gave to the petitioners a clear choice. They would proceed with Mr. Jones and Mr. O'Connor for the purpose of completing the hearing or represent themselves at the hearing (197, 198). The court recessed to allow petitioners to make a decision.

During the recess, the trial justice contacted the firm of F. Lee Bailey and later stated on the record that it was the court's understanding that a member of that firm would be in court the following morning prepared to commence the selection of a jury. The trial justice strongly recommended that petitioners' present attorneys remain in the case for the balance of that day so that there would be an orderly transition of the files to the newly retained counsel "* * * because in no event will the trial of this case be further delayed" (199).

In response, Mr. Jones, the attorney for petitioner Lutz, stated that Lutz would "stand on his position" that because of the retention of Gerald Alch of "Mr. Bailey's firm," he (Jones) was "no longer" Lutz's attorney and that "* * * he (Lutz) did *not* want me (Jones) to proceed with this hearing on his behalf * * *" (200). The court responded that the newly retained attorney was not present and that "* * * the only attorney that is here that could aid and assist the defendant is yourself" (200). The court further stated that "* * * the choice is the defendants but the hearing will continue to it's conclusion and the selection of the jury will commence tomorrow morning * * *" (200, 201). At this point attorney O'Connor stated that he had been "similarly advised by his client" (petitioner DeChiaro).

Petitioner Lutz asked and received permission to address the court. He stated that he had "* * * come to the conclusion * * *" that because Mr. Jones was a "special prosecutor * * * there is a confliction of in-

terests" (201). The court responded that Mr. Jones was the Special Prosecutor in June (actually since March of 1974) and questioned whether it could have taken that length of time to make such a determination (201). Petitioner Lutz stated that Jones was not the lawyer of his choice. Petitioner DeChiaro then announced that "the association between Mr. O'Connor and Mr. Stewart Jones is the same" (202), implying that there was also a conflict of interest as far as attorney O'Connor was concerned (202).

The colloquy between the court and petitioners continued. The court stated that he regarded this attempt to change attorneys as a ploy to attempt to delay the trial, since Mr. Jones had been appointed Special Prosecutor in March of 1974, and now on the eve of trial the petitioners were attempting to raise the issue of conflict of interest (203, 204). Petitioner Lutz was adamant, stating "* * * I don't want him for my attorney. That's all I have to say." And then added "Today either" (205). The court said that the hearing would go forward "at this time with or without counsel" (205, 206). DeChiaro stated that if "* * * that's the way it's got to be, that's the way it's got to be" (206). Both petitioners then stated that Jones and O'Connor would not represent them at the hearing and the hearing proceeded with both petitioners representing themselves (206-245).

At the close of the suppression hearing, the court stated that it had talked by telephone again to the Bailey law firm and had again advised that firm that the jury selection was to begin at 9:30 a.m. the next day and that Mr. Bailey had advised the court that "his partner would be present in Court at that time" (246).

It should here be noted that during the course of the uproar over the discharge of petitioners' prior attorneys,

the People had made available to petitioners a copy of the report of the hair comparison analysis. It is thus untrue to say that the People had failed to comply with the discovery order. Petitioners' expert delayed the tests, but the results were made available to both petitioners prior to trial. And in any event, the tests were negative.

The following morning, September 11, 1974, petitioners appeared in court without counsel and said that Mr. Alch was fogbound at Logan Airport in Boston (769). The court attempted to pin down petitioner Lutz as to whether or not Mr. Alch did represent him, but Lutz was evasive (770). The court did confirm that he had spoken to Mr. Alch and he would be present later that day. At this point the court released the jury until the following day—in effect granting an adjournment to the petitioners (770, 771). The court stood in recess to await the arrival of Mr. Alch.

At 5:40 p.m. on September 11, 1974, court reconvened. Mr. Alch was present in the courtroom. Petitioners both announced that they were still unrepresented by counsel. Mr. Alch then spread upon the minutes a lengthy statement (774-788). He stated that he had discussed the matter with the court in chambers and requested a continuance of seven calendar days to prepare for trial (776). One of the reasons for such a delay, he stated, was that he had to gather evidence (had not this already been done?) of police brutality (777, 778). The court stated that, since no confession was to be used, he saw no relevancy of such evidence (779, 780).

Mr. Alch then admitted that the court had consented to postpone the opening of proof until the following Monday, so long as a jury was selected the following day (Thursday). Mr. Alch stated that "* * * it is quite possible for me to go to trial on Monday * * *" but that *he*

would not deem this sufficient time and so would not enter an appearance on behalf of petitioners (781).

The court then stated that there was a difference of opinion between Mr. Alch and the court as to what constituted a reasonable time to prepare. The court noted that attorney Alch would have three calendar days to prepare (four if Thursday was counted) and further noted that Mr. Alch had with him a trial assistant, Mr. Daly, to assist in selecting a jury and trial preparation. The court stated that the issues in the case were such that in its opinion, considering the other factors, Mr. Alch could be ready four days hence (782-784). The court went on to note that the petitioners on the eve of trial made the choice to discharge their "competent, adequate counsel" (786). The court asked Mr. Alch to undertake the representation of the petitioners but he would not do so (787, 788).

The court then stated to petitioners, who had been present in court throughout the colloquy with Mr. Alch, that they appeared to be without counsel and advised them to reconsider their discharge of Jones and O'Connor (who were then also physically present in the courtroom). The court then pointed out that Jones and O'Connor were "* * * able, competent counsel, who are very familiar with this case and * * * prepared to move forward and defend this matter on your behalf" (789).

Petitioner Lutz stated that he had discharged "my lawyer" and petitioner DeChiaro agreed. The court then made the following direction:

> "Under the circumstances I am appointing Mr. Jones to aid and assist Mr. Lutz during the trial of this case. The degree of cooperation will depend upon the defendant's own choice. I am also designating Mr. O'Connor to aid and assist Mr. DeChiaro

> in the trial of this case and the degree of the cooperation will depend on the defendant's own actions" (791).

Jones protested the appointment (792). The court then turned to petitioner Lutz and asked him if he objected. Lutz stated: "I strongly object." The court asked the same question of petitioner DeChiaro, who replied "I do object." The court then stated to petitioners that they were "* * * on their own" and directed them to be present the following day to begin jury selection (792).

The following day, September 12, 1974, court reconvened for the selection of a jury. Petitioners were present. The court asked DeChiaro if he was represented by counsel. DeChiaro responded: "I will not proceed with an attorney" (280). The court then asked Lutz the same question and Lutz replied: "Ready to proceed without an attorney" (280, 281).

Petitioner Lutz then proceeded to make a legally sophisticated motion to disqualify the trial justice which was denied (281, 282). The court again pointed out that their posture of appearing before the court without attorneys was the result of their "* * * own free will and voluntary acts * * *" (282).

Jury selection then proceeded and was completed that same day. One of the jurors stated that she was the first cousin of Mr. O'Connor's *law partner* (290) but stated that she had never discussed the case with her cousin and her relationship would not influence her decision in any way (290, 291). She was acceptable to the People and was seated. Petitioners, when asked if they wished to examine and challenge any jurors stated that they did not wish to participate in the trial "in any way" (299).

When the jury selection was completed, the court fully instructed them in their duties (313-317) and the People opened (317). The court then took a brief recess and when the court reconvened the court again spoke to the petitioners concerning their right to counsel. The court "strongly recommended" that petitioners either obtain counsel of their choosing or "permit the court to assign counsel to assist them throughout this trial" (326). Both petitioners, when asked the direct question whether they wished the court to appoint counsel, fenced with the court and continued to assert that they wanted Mr. Alch, but both made it crystal clear that they would not accept assigned counsel (326-336). Quite clearly petitioners wished to leave themselves in their present posture of being without counsel and gamble all upon an appellate finding that they had been deprived of their right to counsel.

The trial commenced on September 12, 1974, with the petitioners unrepresented by counsel. The People called 13 witnesses and introduced some 61 exhibits into evidence. In summary, the witnesses testified that the police had received a tip that the Crooked Lake Hotel was to be "hit" on the weekend of January 26, 1973. They "staked out" the premises. On the evening of January 27, 1973, the officers concealed in the building saw both petitioners come to the window, examine the premises and then leave. The following evening petitioners, accompanied by two other men, returned. Petitioners entered while the other two remained outside. Both petitioners were identified in the courtroom by three police officers as the two that entered. These same three officers stated that DeChiaro displayed a pistol. When fired upon, petitioners fled. They were tracked through the snow and captured in the woods several miles from the Crooked Lake Hotel. Petitioner Lutz was found under a tree and petitioner DeChiaro was apprehended hiding in a tree.

Following the presentation of the People's case, the court on September 13, 1974, adjourned for the weekend (667). Petitioners were advised that they could put in their proof, if they so desired, on Monday, September 16, 1974. On that day, both petitioners requested a mistrial upon the grounds that they did not have an attorney who was properly prepared (674), which motion was denied. Petitioners then declined to present evidence on their own behalf, stating that they "* * * were not now nor never had been defending * * *" themselves (676). The proof was declared closed and, following a summation by the People (petitioners declined), the case was submitted to the jury. Their verdict was one of guilty on both counts of the indictment (751). Both petitioners immediately applied for bail pending appeal (again, a sophisticated request), but this was denied (754, 755) and the petitioners remanded.

That very same day, within a short time after the guilty verdicts, Mr. Alch's associate was on the telephone to the office of the Special Prosecutor concerning bail pending appeal. The following day, Mr. Alch and Mr. Daly did in fact come to this court and did obtain the release of petitioners on bail pending the determination of their appeal.

Petitioners were sentenced on September 30, 1974. Both petitioners stated that they then had an attorney but that he was "in Boston." They stated that they did not wish to be represented by counsel at the time of sentencing (758). Each petitioner was sentenced to an indeterminate term of 25 years maximum on the burglary conviction and to an indeterminate term of 15 years maximum on the attempted robbery conviction, both sentences to run concurrently (760-764).

Petitioners appealed their convictions to the Appellate Division of the Supreme Court, Third Judicial Department. In a unanimous opinion, that court affirmed the convictions. That court ruled that the discharge of their attorneys by petitioners was unjustified and constituted a wrongful attempt to interfere with the orderly course of their trial. The court further felt that the attorney which the petitioners had attempted to hire had sought to arbitrarily dictate to the trial judge when the case would be tried. It found no infringement of the petitioners' constitutional right to the assistance of counsel.

On the issue of the alleged police brutality, the Appellate Division was of the opinion that the tentative opinion of the trial judge expressed in chambers was not a formal trial ruling and could not be reviewed on appeal.

Upon the unanimous affirmance by the Appellate Division, petitioners sought permission to carry an appeal to the Court of Appeals of the State of New York but this application was denied. Petitioners now seek a writ of certiorari so that their convictions might be reviewed by this Court.

Argument.

As respondent understands the principles controlling an application to this Court for a writ of certiorari, it is incumbent upon the petitioners to demonstrate that there are special and important reasons for granting the writ and, since this is an appliction to review a ruling of a state Court, that the state Court has decided a federal question of substance not theretofore determined by this Court or has decided it in a way probably not in accord with the applicable decisions of this Court (see Rule 19, Rules of the Supreme Court). Respondent

submits that the petitioners have failed to make such a showing and, accordingly, the writ should not issue.

The constitutional rights claimed to have been infringed upon are the right to the assistance of counsel guaranteed by the Sixth Amendment and the right to confront and cross examine witnesses, also guaranteed by the Sixth Amendment.

Unquestionably, petitioners had a right to the assistance of counsel and to confront and cross examine the witnesses presented against them. Respondent contends, however, that nothing which transpired in the Rensselaer County Court violated the petitioners' Sixth Amendment rights.

When the record of the proceedings had at the trial level is examined and carefully scrutinized, it is clear that both petitioners deliberately attempted to manipulate their Sixth Amendment right to the assistance of counsel in such a manner so as to delay, obstruct and impede the orderly procedure of their trial.

Observe what transpired in the Trial Court below. Within days after their arrest in January of 1973, both petitioners hired private counsel of their own choosing. Both attorneys were knowledgeable and experienced in the defense of criminal cases and they immediately undertook and pursued with great vigor the defense of petitioners. They obtained preliminary examinations despite the fact that their clients had theretofore waived same. They made varied and numerous motions for dismissal, discovery, bills of particulars, suppression of their confessions and suppression of identification testimony. As a result of their efforts, the People abandoned any thought of using the written confessions made by peti-

tioners. Moreover, the attorneys were, by their efforts, enabled to discover and examine every photograph, report and item of physical evidence which the People had in their possession.

During some of the time when he represented the petitioner Lutz, his attorney, E. Stewart Jones, Jr., had served as a Special Prosecutor for Rensselaer County on other, unrelated criminal cases. His active services ended in June of 1974 when he successfully prosecuted a murder case. There was widespread coverage in the news media about Mr. Jones' prosecutorial efforts in the murder case and there was hardly a person in the area who did not know of his role. And most of the excellent defense motions were made by him while so serving as such Special Prosecutor.

In the summer of 1974, Judge John J. Clyne was assigned to preside at the trial of this case. He advised the Special Prosecutor and defense counsel that they must be ready at the opening of the September trial term. When the trial term opened the petitioners plea bargained but the results were not to their liking and the bargaining ended.

To the knowledge of petitioners, Judge Clyne had a reputation among the legal community of being stern in the sentences he imposed in criminal cases once the guilt of the accused had been determined. Also to the knowledge of petitioners, Judge Clyne's assignment to the Rensselaer County Court was for but a short time, due to end about September 19, 1975, as respondent recalls it. Respondent believes that these two considerations formed the basis of all that transpired below.

On the very eve of trial, petitioner's counsel stayed the trial and moved for a change of venue. The motion

was denied and the stay lifted. In the meantime the identification suppression hearing had proceeded before Judge Clyne. It had been directed by Judge Clyne that the hearing and the trial be held as one proceeding, with the hearing taking place first and then the trial-in-chief commencing immediately thereafter. When it became plain to petitioners that their last efforts to delay the trial had failed, they, in desperation, discharged their attorneys and attempted to employ other counsel. The hearing phase of the trial had already begun and an entire day of testimony had been taken when this discharge took place.

The reasons given by petitioners for the discharge of their counsel were patently false and spurious. Petitioner Lutz stated that Mr. Jones had been acting as a Special Prosecutor and there was a conflict of interest between his duties as such Special Prosecutor and his duties as defense counsel. In fact, there was no such conflict because there was not the remotest connection between the cases Mr. Jones prosecuted and this case. And if petitioner Lutz had no basis in fact to assert that such a conflict existed, *a fortiori* petitioner DeChiaro had no basis either, for his counsel, Mr. O'Connor, had never served as a Special Prosecutor and he was discharged merely because of his association with Mr. Jones.

It is quite clear that this discharge was groundless and, in fact, conceived in bad faith by petitioners solely to delay the trial and escape from the jurisdiction of Judge Clyne, whom they feared. The bad faith of petitioners is underscored by the fact that they would not even permit Mr. Jones and Mr. O'Connor to continue on with the suppression hearing despite the fact that Mr. Jones and Mr. O'Connor had represented them with great effectiveness and vigor on the first day of the hearing. Petitioners had deliberately undertaken to defy the Trial Court and to subvert and destroy their trial.

The hearing phase of the trial was completed with both petitioners refusing to participate. The matter was then adjourned to await the arrival of the new defense counsel from Boston. It is, respondent believes, most significant that when the discharge of Mr. Jones and Mr. O'Connor was announced, without warning, to the Trial Court, the Court was led to believe that Mr. Alch had already agreed to represent petitioners. If such impression had not been given, it is unlikely that the Court would have permitted the discharge in question.

The Trial Court stood in recess all during the day of September 11, 1974, awaiting Mr. Alch. When he appeared at the end of that day, it developed that he had not yet agreed to represent petitioners and would not do so unless he had a continuance of seven days. The Trial Court, having in mind the duration of its assignment in Rensselaer County and the limited time available for trial, offered a four-day continuance in the taking of proof so long as a jury were selected in the interim. Mr. Alch stated that he *could* be ready in this time, but that *he* would not be satisfied with this amount of preparation. It was during this discussion in chambers that Mr. Alch stated that he wanted to investigate the allegations of police brutality as bearing on the motive of the prosecution witnesses. The Court expressed the opinion that such evidence was wholly collateral and not admissible.

In any event, having failed to dictate to the Trial Court when the matter would be tried, Mr. Alch refused to enter the case. This left petitioners with no counsel and so the Trial Court, realizing that Mr. Jones and Mr. O'Connor were the only lawyers available who were thoroughly familiar with the case and prepared to defend, assigned them to represent petitioners. But petitioners knowingly refused to accept Mr. Jones and Mr. O'Connor

even as their assigned counsel and advised the Trial Court, in effect, that if they could not have Mr. Alch as their attorney and on Mr. Alch's terms, then they would not accept any attorney and would not participate in the trial at all.

Quite clearly the petitioners adopted the strategy of gambling all that their convictions would be reversed because of the fact that they were unrepresented by any attorney during the remainder of the trial. It was the gamble of desperate men. However, the magnitude of the proof against them was such that perhaps this was the best defense available to them. In any event, petitioners sat mute during the trial and were convicted after the jury heard the overwhelming evidence against them.

It is respondent's position, that, while the Sixth Amendment right of an accused to the assistance of counsel must be jealously guarded, still, no defendant should be permitted to manipulate such right for the purposes of delaying, obstructing and destroying his own trial. The Courts have uniformly prevented any effort to prostitute the Sixth Amendment in such a way. See *Arellanes v. United States,* 302 F. 2d 603 (9th Cir. 1962). In fact in *Arellanes v. United States,* 326 F. 2d 560 (9th Cir. 1964), the Court commented that similar conduct to that which here occurred in the Court below can amount to a waiver of the right of counsel and respondent contends that such conduct did constitute such a waiver. See also *United States v. Cozzi,* 354 F. 2d 637 (7th Cir. 1966); *United States v. Bentvena,* 319 F. 2d 916, 936 (2nd Cir. 1963), cert. den. *sub nom. Ormento v. United States,* 375 U. S. 940, 84 S. Ct. 345, 11 L. Ed. 2d 271; *Leino v. United States,* 338 F. 2d 154 (10th Cir. 1964); *Glenn v. United States,* 303 F. 2d 536, 540-541 (5th Cir. 1962); *United States v. Sperling,* 506 F. 2d 1323 (D. C. Cir. 1974); *United States v. Arden,* 252 F. 2d 491 (2nd Cir. 1958).

And in *United States v. Abbamonte,* 348 F. 2d 700 (2nd Cir. 1965), the Court made it clear that where the defendant refuses to accept counsel, he can be ordered to trial without counsel.

Petitioners' bad faith in discharging their attorneys for the purposes of the delay and obstruction and subversion of their trial should remove from the consideration of this Court any plea by them that their right to counsel was infringed upon by the Trial Court. Once their trial had started, they had no absolute right to discharge their attorneys and demand a continuance. *United States v. Fay,* 348 F. 2d 705 (2nd Cir. 1965); *Swope v. McDonald,* 173 F. 2d 852 (9th Cir. 1949), cert. den. 337 U. S. 960, 69 S. Ct. 1522, 93 L. Ed. 1759.

Any such application for such discharge and continuance was one addressed to the discretion of the Trial Court. *Smith v. United States,* 353 F. 2d 838 (D. C. Cir. 1965). Respondent contends that there was no clear abuse of discretion by the Trial Court. When the petitioners indicated that they had hired successor counsel who would be prepared to adhere to the Court's preannounced trial schedule, the Court permitted the withdrawal of prior counsel, albeit reluctantly. When successor counsel appeared, it offered such counsel a four-day continuance in the taking of proof so long as a jury was selected. In this connection, it must be remembered that successor counsel was accompanied by a skilled and capable trial assistant and a trained investigator was also in their employ. The Trial Court's offer was not unreasonable. There was no abuse of discretion and in the absence of a clear abuse of discretion, the action of the Courts below should not be reversed and, indeed, should not even be reviewed by this Court. *Neufield v. United States,* 118 F. 2d 375 (D. C. Cir. 1941), cert. den.; *Ruben v. United States,* 315 U. S. 798, 62 S. Ct. 580, 86

L. Ed. 1199; *Avery v. State of Alabama,* 308 U. S. 444, 60 S. Ct. 321, 84 L. Ed. 377; *Johnson v. United States,* 291 F. 2d 150 (8th Cir. 1961); *Cleveland v. United States,* 322 F. 2d 401, 402-403, cert. den. 375 U. S. 884, 84 S. Ct. 841, 11 L. Ed. 2d 114 (1963).

And see *Ungar v. Sarafite,* 376 U. S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964), where this Court found no abuse of discretion in a five-day period of time for counsel to prepare for the defense of a criminal type proceeding.

Petitioners now additionally complain because the Trial Court did not assign Mr. Jones and Mr. O'Connor to be present in the courtroom to assist them during the remainder of the trial. But, they strenuously protested when the Court attempted to do this very thing and the Court had no right to force counsel upon them over their strongly voiced objections. *Brown v. United States,* 264 F. 2d 363 (D. C. Cir. 1959), cert. den. 360 U. S. 911, 79 S. Ct. 1299; *Johnson v. United States,* 318 F. 2d 855 (8th Cir. 1963). If the Trial Court had done so, the claim of the petitioners would have been that *this* constituted an infringement upon their rights. They had no right to seek to place the Trial Court in a position where they could later claim that it was in error whichever course it adopted.

The main cases relied upon by petitioners are not in point. In *Patton v. State of North Carolina,* 315 F. 2d 643 (4th Cir. 1963), the Court found that the defendant had reasonable grounds for discharging his attorney and, moreover, the Trial Court had refused to assign counsel thereafter. In the case at bar, petitioners' discharge of their counsel during trial was groundless and done in bad faith and the Court attempted, without success, to thereafter assign counsel. In *United States v. McMann,* 252

F. Supp. 539 (N. D. N. Y.), the defendant's retained counsel had been harassed and badgered by the Trial Court to the point where, on the verge of collapse, she withdrew from the case. Thereafter, when defendant's family was unsuccessful in retaining other counsel, the defendant refused assigned counsel and attempted to conduct his own defense. Neither case supports the petitioners' position that, in the factual situation here presented, their right to counsel was infringed. Both petitioners discharged their attorneys groundlessly and refused to accept competent, prepared assigned counsel and refused to participate in the trial. They have no basis to complain. This Court should not take cognizance of their plight for they alone are the authors of such plight.

Petitioners also attempt in their petition to raise the issue that their Sixth Amendment right to confront and cross examine witnesses was infringed upon. The problem here, of course, is that no such trial rulings were ever made because the petitioners, having refused counsel, sat mute. Therefore, nothing is preserved to them on appeal. *United States v. Bando,* 244 F. 2d 833, 845-846 (2nd Cir. 1957), cert. den. 355 U. S. 844, 78 S. Ct. 67, 2 L. Ed. 2d 53. Moreover, no such rulings were ever made by the Trial Court. In an off-the-record, in-chambers discussion with counsel, the Trial Court advanced a tentative opinion as to the admissibility of certain evidence—were it to be offered. Merely because this was later alluded to by the Trial Court when discussing with Mr. Alch on the record whether he would enter the case, does not transform this opinion into a reviewable trial ruling. Nor does the comment made by petitioner Lutz to the effect that *if* he was represented by counsel and *if* he was participating in the trial he would offer certain evidence, constitute a reviewable trial ruling.

Respondent has no quarrel with the cases cited by petitioners on this issue. Respondent merely states that they

have no applicability to the facts at hand where petitioners sat mute and refused to participate in the trial and, therefore, never raised as an issue that which they now seek to have reviewed by this Court.

In opposing petitioners' application for a writ, respondent also relies upon the following cases: *People v. O'Neill,* 179 P. 2d 10, 78 Cal. App. 2d 888, cert. den. *O'Neil v. State of California,* 333 U. S. 858, 68 S. Ct. 728, 333 U. S. 858, 92 L. Ed. ; *Sanchez v. United States,* 311 F. 2d 327 (9th Cir. 1962), cert. den. 373 U. S. 949, 83 S. Ct. 1678; *People v. Higgins,* 23 A. D. 2d 504 (N. Y.), aff'd 16 N. Y. 2d 751; *People v. Davis,* 21 A. D. 2d 375 (N. Y.), lv. to app. den.; *People v. Reynolds,* 39 A. D. 2d 812 (N. Y.).

Conclusion.

It is respectfully submitted that petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. There is no showing that the New York Court has decided a federal question of substance not heretofore determined by this Court or in a way not in accord with the applicable decisions of this Court. The issues presented to the Trial Court were matters addressed to its sound discretion. No clear abuse of discretion has been demonstrated. A writ of certiorari should not issue.

Respectfully submitted,

DONALD J. SHANLEY,
Special Prosecutor,
Rensselaer County, New York,
35 First Street,
Troy, N. Y. 12180